

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY JOE HOORNSTRA,

Defendant-Appellant.

UNPUBLISHED
November 3, 2000

No. 216876
Wexford Circuit Court
LC No. 98-005258-FC

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(2); unarmed robbery, MCL 750.530; MSA 28.798; and first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant to life without parole for the felony murder conviction and forty to sixty years' imprisonment for the CSC I conviction. The unarmed robbery conviction was vacated because it was the underlying felony for the felony murder. Defendant appeals as of right. We affirm.

Defendant argues that his conviction should be reversed because an expert did not testify at trial in support of his defense of voluntary intoxication. Defendant claims he was denied due process because his trial counsel was ineffective in failing to call an expert to testify on this issue. Defendant's argument is without merit.

Defense counsel testified at the *Ginther*¹ hearing that he feared an expert would be harmful to defendant's intoxication defense because the expert might testify that defendant had a high tolerance for alcohol; therefore, alcohol had nothing to do with his decisions on the night of the crime. Accordingly, counsel's decision not to call the expert was a matter of trial strategy that we will not second guess on appeal. *People v Henry*, 239 Mich App 140, 149; 607 NW2d 767 (1999). Furthermore, counsel's failure to call an expert did not deprive defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 902 (1996). Substantial

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

evidence was presented on the issue of intoxication, and the jury was instructed pursuant to CJI 2d 6.2 that defendant claimed he could not have specifically intended to permanently deprive the victim of her money or property because he was intoxicated. Counsel's representation did not fall below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant has also failed to show that he was prejudiced by counsel's performance. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Even assuming an expert would have testified favorably for defendant, there is not a reasonable probability that the result of the proceedings would have been different considering defendant's detailed description of the crime. *Id.* Defendant recalled all of the events during his encounter with the victim, including the victim's last words and his actions of spraying cologne on the door in an attempt to remove his fingerprints. After examining the record in this case, we cannot conclude that defendant received a fundamentally unfair trial as the result of not having expert assistance. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). He was not denied due process. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald